Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

ALBERT BOSSLEY, ET AL.,

Petitioners,

v.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether Petitioners' rights to due process of law under the Fourteenth Amendment to the United States Constitution were violated when the Texas Supreme Court, without any jurisdictional authority, decided the issue of proximate cause as an issue of contested fact rather than as of law.

2) Whether Petitioner Albert Bossley's right to due process of law under the Fourteenth Amendment to the United States Constitution was violated when the Texas Supreme Court, without any jurisdictional authority, (i) rendered judgment in favor of a party that had been non-suited by Albert Bossley and was no longer a defendant in the case as to Albert Bossley, and (ii) used such judgment to immunize all remaining defendants.

3) Whether Petitioners' rights to due process of law under the Fourteenth Amendment to the United States Constitution were violated when the Texas Supreme Court interpreted Texas Civil Practices and Remedies Code § 101.106 against its plain meaning and in an arbitrary and capricious manner.

LIST OF PARTIES

The parties both to the proceedings below and before this Court are the Petitioners, Albert Bossley, Elaine Bossley, and the Estate of Roger Arthur Bossley, Deceased, and the Respondents, Dallas County Mental Health and Mental Retardation, John Kamphaus, M.D., Harold Urschel, M.D., Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila, and Patricia Prince.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners Albert Bossley, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas entered in the above-entitled proceeding on April 14, 1998. A petition for rehearing was timely filed but denied by that court on June 23, 1998.

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at 968 S.W.2d 339, and is reprinted in the appendix hereto, App. 1-17. The denial of the motion for rehearing has not been reported and is reprinted in the appendix hereto, App. 20, 21.

The summary judgment by the trial court has not been reported and is reprinted in the appendix hereto, App. 54-56. The opinion of the Dallas Court of Appeals is reported at 934 S.W.2d 689, and is reprinted in the appendix hereto, App. 22-44. The supplemental opinion by the Dallas Court of Appeals has not been reported and is reprinted in the appendix hereto, App. 45-53.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Texas Supreme Court is invoked under 28 U.S.C. § 1257(a). The judgment of the Texas Supreme Court sought to be reviewed was entered on April 14, 1998, and,

after a timely petition for rehearing was filed, the order denying rehearing was entered on June 23, 1998.

The federal constitutional issues addressed in this petition were first raised in a motion for rehearing to the Texas Supreme Court. *See* App. 57, 58. The issues were not raised before the motion for rehearing because there was no prior indication the Texas Supreme Court would exceed its jurisdictional authority or rewrite the immunity statute in an arbitrary and capricious manner. In short, the federal constitutional issues were created by the opinion of the Texas Supreme Court and were timely raised in a motion for rehearing. *See Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935) (federal constitutional issues raised for the first time in a motion for rehearing are timely if the federal issues arose from an unanticipated ruling of the state court).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION, ARTICLE 5, § 6

§ 6. Courts of Appeals; terms of Justices; clerks

Sec. 6. The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. *Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.* Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law. Each Court of Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals. (emp. supplied)

TEX. CIV. PRAC. REM. CODE § 101.021 Governmental Liability.

A governmental unit in the state liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(a) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(b) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. REM. CODE § 101.106 Employees Not Liable After Settlement or Judgment.

A judgment in an action or settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.

TEXAS GOVERNMENTAL CODE § 22.001(a) Jurisdiction.

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appealable judgment of the trial courts.

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEXAS GOVERNMENTAL CODE § 22.225(a) Effect of Judgment in Civil Cases.

> (a) A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.

STATEMENT OF THE CASE

On the morning of August 12, 1988, Roger Bossley was a patient at the Dallas County Mental Health and Mental Retardation Hillside Center ("MHMR") in Dallas, Texas. He had been diagnosed as suffering from major depression and as being suicidal. One of his treating physicians, Dr. Kamphaus, swore under oath that Roger "presents a substantial risk of serious harm to self of [sic, "or"] others if not immediately restrained, the detailed basis for this opinion being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization." App. 56-61. Due to this diagnosis, Roger was ordered back to a more secure facility. In a meeting on the morning of the 12th at Hillside, medical staff discussed the fact that Roger did not want to be transferred to a different facility and therefore was an elopement risk. The doors to the facility were ordered locked to prevent Roger from eloping. Staff members recognized that the doors were being locked so Roger could not elope and try to harm himself.

After a staff member negligently unlocked and opened the front door, Roger eloped the facility and immediately ran to a nearby highway. He was pursued by MHMR employees and crossed the highway three times.

Every time he was seen crossing the highway, Roger intentionally put his life at risk by either running or jumping in front of vehicles. Roger finally was killed when he jumped in front of a truck.

Roger Bossley's parents, Albert and Elaine Bossley, brought suit against MHMR and various medical staff members for negligence. All defendants moved for summary judgment on the basis of governmental immunity, official immunity and lack of proximate causation. The trial court granted the summary judgments in favor of all defendants on all grounds. The Bossleys appealed, and the Dallas Court of Appeals unanimously reversed on all grounds. Defendants appealed to the Texas Supreme Court, which held against the Bossleys by:

1. finding as a matter of contested fact that "[a]fter fleeing Hillside, Roger ran half a mile and then attempted to hitchhike on both sides of a freeway. Only when he was about to be apprehended did he leap in front of an oncoming truck.";

2. using this erroneous factual finding as the sole basis for the legal conclusion of no proximate cause as matter of law ("the use and condition of the doors were too attenuated from Roger's death to be said to have caused it.");

3. using the erroneous judgment in favor of MHMR to immunize all remaining defendants through a misreading and misapplication of section 101.106 of the Texas Civil Practice and Remedies Code; and

4. ignoring a timely non-suit by Albert Bossley against MHMR that had deprived the Texas

Supreme Court of any jurisdiction to render judgment in favor of MHMR against Albert Bossley.

The Bossleys now apply for writ of certiorari to this Court because the Texas Supreme Court has violated their rights to due process of law under the Fourteenth Amendment to the United States Constitution by deciding contested issues of fact without jurisdictional authority, rendering judgment against Albert Bossley in favor of MHMR without jurisdictional authority, and interpreting an immunity statute against its plain meaning and in an arbitrary and capricious manner.

This case is but part of a recent trend by the Texas Supreme Court to rule against plaintiffs in favor of governmental entities and health care defendants. According to Texas Citizens Action's Court Watch, the Texas Supreme Court ruled in favor of such defendants 13 out of 14 times during the 1996-97 term, and 14 out of 17 times (excluding 3 splits) during the 1997-98 term. *See* App. 62.

REASON FOR GRANTING THE WRIT

1. The Texas Supreme Court did not have jurisdiction to decide this case as a matter of fact and therefore violated the Bossleys' rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

In summary judgment practice in Texas, a reviewing court is bound to accept as true all facts and reasonable factual inferences that favor the non-movant. *Nixon v. Mr.*

Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). As discussed in the preceding section, the Supreme Court's entire opinion is based on its factual assertion that Roger Bossley jumped in front of a truck only after he attempted to hitchhike on both sides of a freeway.[1] The Court's legal reasoning apparently is that Roger's purported act of hitchhiking on both sides of the highway before jumping in front of a truck for the first time broke the chain of proximate causation.

This analysis is fundamentally flawed and "ignores the traditional proximate cause elements of cause in fact and foreseeability." *See Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1998) (Abbott, J. dissenting) App. 13. Dr. Kamphaus swore under oath that Roger presented a substantial risk of harm to himself if not immediately restrained and that Roger had verbalized the intent to kill himself after he left the hospital. The front doors at Hillside Center were locked specifically to restrain Roger within the facility. When the doors were negligently unlocked and opened, Roger eloped the facility and was killed. As the Texas Supreme Court dissent states, not only does a fact issue exist on proximate causation, "foreseeable injury resulting from the use or condition of the doors is almost established as a matter of law." App. 17. The majority's analysis becomes completely unsustainable when it is applied to the correct

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[1] The Court of Appeals also recites this incorrect version of the facts. This error of fact was not brought to the attention of the Court of Appeals at the time because (i) the Court of Appeals correctly concluded that a fact issue on proximate cause existed and (ii) there was no way to anticipate that the error of fact would become relevant at the Texas Supreme Court level.

facts, as discussed below. The Supreme Court's refusal to consider the correct facts in its analysis is a fundamental violation of its jurisdiction and therefore a violation of due process of law under the Fourteenth Amendment to the United States Constitution.

The testimony of witnesses actually at the scene indicate that the Supreme Court's version of events is incorrect. For example, when eye witness Domingo Davila *first* saw Roger cross the highway to the other side, he saw Roger attempt to get hit by a vehicle by running "right in front of an 18-wheeler". App. 64. Further, witness Laura Moore was aware that Roger had made previous attempts to run in front of traffic when he crossed the highway the first two times. App. 68-71.

The Dallas Court of Appeals, after reviewing the evidence, held that a fact issue existed on the issue of proximate causation. Under Texas law, the judgment of a court of appeals is conclusive on the facts of all civil cases. *See* TEXAS CONSTITUTION, ARTICLE 5, § 6; Texas Government Code § 22.225(a). Texas law does not grant the Texas Supreme Court jurisdiction to decide between contested facts. *See* Texas Government Code § 22.001(a); *see also Chicago, R.I. & G. RY. Co. v. Harris*, 24 S.W.2d 385 (Tex. Comm'n App. 1930, opinion adopted) (the Supreme Court has no jurisdiction of fact questions). Therefore, by ignoring facts favorable to the Bossleys, selecting facts favorable to the defendants, and deciding this case based on the inappropriate facts selected, the Texas Supreme Court has exceeded its jurisdictional authority. Under Texas law, when a court without jurisdiction renders a judgment, the judgment is void. *See Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

Further, the Fourteenth Amendment to the United States Constitution provides in relevant part that a state may not deprive a person of property without due process of law. A state court judgment rendered without jurisdictional authority is reviewable by this court and violates the due process clause of the Fourteenth Amendment. *See, e.g., Construction Laborers v. Curry*, 371 U.S. 542 (1963) (U.S. Supreme Court had jurisdiction to review judgment of state court that erroneously asserted its jurisdiction to deal with a controversy beyond its power); *Scott v. McNeal*, 154 U.S. 34 (1894) (judgment rendered by state court lacking jurisdiction violated Fourteenth Amendment); *Pennoyer v. Neff*, 95 U.S. 714 (1878) (lack of in personam jurisdiction violates Fourteenth Amendment).

In Texas, wrongful death damages are considered property rights. *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W.2d 641, 646 (Tex. App. – Amarillo 1987, no writ) (and cases cited therein). Therefore, by rendering judgment without jurisdictional authority and depriving the Bossleys of wrongful death damages, the Texas Supreme Court has violated the Bossleys' rights to due process under the Fourteenth Amendment to the United States Constitution.

2. The Texas Supreme Court did not have jurisdiction to render judgment against Albert Bossley in favor of MHMR because MHMR had been non-suited prior to judgment.

Albert Bossley non-suited MHMR in the trial court on November 30, 1990. App. 74, 75. The non-suit was

effective because it preceded the date of the judgment appealed from (January 23, 1991). The relevant procedural history is described in App. 72, 73. Although a letter sent to counsel concerning the judgment was dated before the non-suit was filed, this letter and its related judgment were rendered nullities and of no legal effect when the trial court vacated the judgment on January 23, 1991. *See P.V. International Corporation v. Turner, Mason, and Solomon*, 700 S.W.2d 21, 22 (Tex. App. – Dallas 1985, no writ); *McCauley v. Consolidated Underwriters*, 304 S.W.2d 265 (Tex. 1957); *Sawyer v. Donley County Hospital District*, 513 S.W.2d 106, 109 (Tex. Civ. App. – Amarillo 1974, no writ). The order vacating the first summary judgment in effect placed the parties in the same position they would have been in had no summary judgment order been rendered. *See P.V. International Corporation, supra*, at 22; *Stinnette v. Mauldlin*, 251 S.W.2d 186, 220 (Tex. Civ. App. – Eastland 1952, writ ref'd n.r.e.) (on motion for rehearing). The order vacating the summary judgment is reproduced at App. 76, 77.

The court of appeals discussed the effect of the non-suit in a supplemental opinion reproduced in the appendix hereto at App. 45-53. The opinion has no legal effect since jurisdiction is fundamental in nature and can be raised at any time. *See Tullos v. Eaton Corp.*, 695 S.W.2d 568 (Tex. 1985); *Johnson v. Pettigrew*, 786 S.W.2d 45, 46 (Tex. App. – Dallas 1990, no writ). However, it is clear from the opinion that the court reached an incorrect conclusion for the three reasons discussed below. Petitioners realize that the United States Supreme Court does not decide issues of state law. However, since the non-suit issue bears on the jurisdiction of the state court and

the jurisdiction of the state court bears on the right of due process of law under the Fourteenth Amendment, an extended discussion of the non-suit issue is included. The Texas Supreme Court did not issue a written opinion on the non-suit issue.

First, the court of appeals concluded that the letter constituted rendition of judgment, citing *Kostura v. Kostura*, 469 S.W.2d 196 (Tex. Civ. App. – Dallas 1971, writ ref'd n.r.e). *Kostura* is not authoritative because the court in that case simply assumed, without deciding, that the letter was a rendition of judgment. Second, the court concludes that since the first summary judgment order contained a "Mother Hubbard" clause, the trial court by necessary implication denied the motion for non-suit. Since the first order denied the motion for non-suit, reasoned the court, there was no motion for non-suit, timely or untimely, pending when the trial court later vacated the first order granting summary judgment. This conclusion is incorrect because when the trial court vacated the first summary judgment order, it put the parties back into the position they were in prior to rendition of the first summary judgment order, including all motions. *See Parrish v. Brooks*, 856 S.W.2d 522, 527 (Tex. App. – Texarkana 1993, writ denied). The motion for non-suit therefore was still active and was effective when filed.

Third, the court's conclusion that Albert Bossley's motion for non-suit was disposed of by the first summary judgment order and was not pending when the second summary judgment order was rendered and signed is contrary to the record in the trial court below. An order signed by the court on January 24, 1991 states that "[o]n the 9th day of January, 1991, came on to be heard

. . . Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation. . . . " App. 78, 79. This order, signed on January 24th 1991, purports to overrule Albert Bossley's non-suit. It is therefore clear from the record that Albert Bossley's non-suit against MHMR survived the vacated first summary order and was active prior to the court rendering and signing the second summary judgment order. Albert Bossley's non-suit was therefore timely. The non-suit was effective to deny the trial court jurisdiction to order judgment in favor of MHMR as against Albert Bossley because the trial court did not have the discretion to deny or overrule the non-suit once it was timely filed. *See BHP Petroleum Co. v. Millard,* 800 S.W.2d 838, 840-41 (Tex. 1990) (a trial court may not deny a party's right to take a nonsuit)

The non-suit is important because it deprived the trial court and the Texas Supreme Court of jurisdiction to render judgment against Albert Bossley in favor of MHMR. In the absence of a judgment in favor of MHMR, Albert Bossley still has viable causes of action for negligence against the individual defendants. This is because assuming arguendo TEX. CIV. PRAC. REM. CODE § 101.106 was applicable before the non-suit, it would no longer be applicable after the non-suit. *See Yanez v. Milburn,* 932 S.W.2d 725, 728 (Tex. App. – Amarillo 1996, writ denied) (non-suit is not a "judgment" that will trigger the application of Section 101.106). Since Albert Bossley's non-suit was effective, the Texas Supreme Court had no jurisdiction to render the judgment in favor of MHMR and against Albert Bossley. A court that renders a judgment without the jurisdiction to do so violates due process of

law. *See Construction Laborers v. Curry, supra; Scott v. McNeal, supra; Pennoyer v. Neff, supra.*

3. The Texas Supreme Court has interpreted Tex. Civ. Prac. Rem. Code § 101.106 against its plain meaning and in an arbitrary and capricious manner.

Tex. Civ. Prac. Rem. Code § 101.106 states in relevant part that immunity is only afforded to those "whose act or omission gave rise to the claim" against the government. Under Texas law, a claim against the government only arises when the personal injury or death is proximately caused[2] by a condition or use of tangible property. Tex. Civ. Prac. Rem. Code § 101.021(2). All parties to this action have consistently plead, and the evidence has shown, that only the acts of Angela Jones involved a use or misuse of tangible property. Therefore, only the acts of Angela Jones could have given rise to the claim against her employer MHMR. Indeed, the defendants have consistently argued throughout this litigation that the acts and omissions of the individual defendants *did not give rise to a claim* against MHMR.

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[2] In its opinion, the Texas Supreme Court purports to resolve the issue of whether the statute requires proximate causation, as opposed to mere "involvement" of tangible property. However, the Bossleys did not plead that property was merely "involved," but rather that Angela Jones' negligent act of opening the door was a proximate cause of Roger Bossley's death. The Supreme Court therefore resolved an issue that was never raised.

The Texas Supreme Court responds to the Bossley's argument by stating that "[a] claimant cannot limit the immunity conveyed by Section 101.106 by singling out one employee's conduct on which to base liability of the governmental unit." App. 11. This response is flawed, however, because the Bossleys did not "single out" the acts and omissions of Angela Jones. Rather, the facts of this case are, and all parties have consistently argued throughout, that only the acts and omissions of Angela Jones could have given rise to liability against MHMR. The Texas Supreme Court again ignores the facts of the case to reach its desired result.

The Texas Supreme Court also states that the Bossleys argue "Section 101.106 does not apply because their action against the individual defendants does not 'involve[ ] the same subject matter' as their action against Dallas County MHMR." App. 11. The Bossleys never made such an argument below and it is curious why the Supreme Court stated that they did. In any event, although the actions of all individual defendants may have involved the same subject matter, the "same subject matter" requirement is not the only requirement of the statute. Section 101.106 also clearly and unequivocally states that it is limited to those individuals "whose act or omission gave rise to the claim." As discussed, the facts indicate, and plaintiffs plead, that only Angela Jones' acts or omissions gave rise to the claim against MHMR. Consequently, even though all the employees' negligence may have involved the same "subject matter," only Angela Jones can be immunized according to the plain and unambiguous terms of the statute.

Petitioners realize that the construction of a state statute is usually left up to the state supreme court. *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 489 (1914). However, this Court has struck down state statutes as being in violation of the Fourteenth Amendment when the statute or its construction is so arbitrary, capricious and unreasonable as to take away property rights in violation of due process of law. *See, e.g., Southwestern Telegraph & Telephone Co. v. Danaher, supra*, at 491 (state statute penalizing telephone company for enforcing reasonable policy struck down as being arbitrary and in violation of Fourteenth Amendment); *Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 47-48 (1922) (statute regarding attorney fees struck down as being an oppressive penalty and a violation of the Fourteenth Amendment); *St. Louis, Iron Mountain & Southern Railway Co. v. Wynne*, 224 U.S. 354, 359-360 (1912) (state statute providing for onerous penalties for non-payment of extravagant demands held to be a violation of the Fourteenth Amendment). The Texas Supreme Court's interpretation and application of Section 101.106 in the instant case is so arbitrary, unreasonable and oppressive that it violates the due process clause of the Fourteenth Amendment.

The Texas Supreme Court has explained that Section 101.106 involves a choice for the tort claimant:

> Although a plaintiff who pursues the statutory remedy against the government may lose his or her common law remedy against the employee, the plaintiff is not required to follow this course. He or she may still opt to pursue the full common law remedy against the responsible

employee, foregoing or postponing any attempt to recover from the government. *Thomas v. Oldham*, 895 S.W.2d 352, 357-58 (Tex. 1995).

When making the choice of whether to pursue the government and thereby subjecting himself or herself to the potential harsh consequences of Section 101.106, the tort claimant should be able to rely on the express and unambiguous language of the statute. The statute states that a judgment under the tort claim chapter will bar actions "involving the same subject matter by the claimant *against the employee* of the governmental unit *whose act or omission gave rise to the claim.*" (Emphasis supplied) The statute does *not* bar actions involving the same subject matter by the claimant against *every employee of the governmental unit regardless of whether their acts or omissions gave rise to the claim.* Prior to the instant case, no Texas court had ever construed Section 101.106 to immunize all employees regardless of whether their acts or omissions gave rise to the claim.

The Bossleys made their choice to sue MHMR based on the unambiguous language of the statute that limited potential immunity *only* to Angela Jones. However, after the Bossleys made their choice, the Texas Supreme Court changed the bargain. The Court has rewritten and reinterpreted the statute to immunize all employees regardless of whether their acts or omissions gave rise to the claim. The new interpretation of Section 101.106 is contrary to the plain language of the statute, and is a capricious construction that turns Section 101.106 into a harsh and misleading trap. The Texas Supreme Court's interpretation of Section 101.106 is so arbitrary and unreasonable that it constitutes a taking of the Bossleys' property

rights in violation of due process of law under the Fourteenth Amendment to the United States Constitution. *See Barbier v. Connolly*, 113 U.S. 27 (1884) (Fourteenth Amendment undoubtedly intended that there should be no arbitrary deprivation of property).

In sum, the Texas Supreme Court has disregarded the most credible facts in this case and has arbitrarily rewritten an immunity statute. Such actions constitute an abuse of jurisdictional power and a violation of Petitioners' constitutional rights to due process of law under the Fourteenth Amendment. This Petition for Writ of Certiorari should be granted because this case involves much more than an isolated error of fact. Rather, this case represents an unconstitutional abuse of jurisdictional power by a state supreme court majority that favors particular defendants.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF TEXAS

No. 97-0028

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL., PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ROGER ARTHUR BOSSLEY, DECEASED, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on November 4, 1997

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE BAKER, and JUSTICE HANKINSON join.

JUSTICE ABBOTT issued a dissenting opinion, in which JUSTICE SPECTOR joins.

We again construe and apply the waiver of governmental immunity for liability for "personal injury and death [proximately] caused by a condition or use of tangible personal or real property" contained in Section 101.021(2) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.021(2). We also consider the scope of governmental employees' immunity provided by Section 101.106 of the Act. We conclude that the court of appeals

erred in reversing summary judgment for defendants. 934 S.W.2d 689.

I

Following a failed suicide attempt, 27-year-old Roger Bossley was involuntarily committed to Parkland Memorial Hospital in Dallas and later transferred to Hillside Center, a treatment facility owned and operated by the Dallas County Mental Health and Mental Retardation Center. Patients resident at Hillside are allowed some freedom to come and go, and during his treatment Roger left Hillside on various outings and visited his parents on a weekend pass. For two weeks he seemed to be recovering from the severe depression that had driven him to try to take his own life, but after a rehabilitation counselor unaware of his condition ridiculed his employment history, Roger became so despondent that he asked another patient at Hillside where he could get a gun so he could kill himself upon his release. That patient immediately reported Roger's statement to Dr. Urschel, one of the treating physicians, who noted in his medical chart that Roger was "a definite risk to himself." Two days later another treating physician, Dr. Kamphaus, ordered that Roger be returned to Parkland for further evaluation in a more restrictive environment. The transfer documents indicated that Roger remained suicidal despite his hospitalization.

As soon as Roger was ordered transferred, Hillside personnel, following standard procedure, locked the front door of the residential unit because patients often resisted transfer to more restrictive facilities and tried to elope.

Roger had himself indicated his reluctance to being transferred, telling Hillside staff members that he feared it would result in his being committed to Terrell State Hospital. Although the front door was locked, a self-locking glass door just inside the front door was left open. The physicians and staff considered further precautions against Roger's possible suicide and elopement, but none were taken.

The next day as Angela Jones, a Hillside technician, was leaving for lunch, she noticed Roger talking on a telephone in the hallway. Passing through the inner doorway, she left the self-locking inner door open behind her. Before unlocking the outer door, she looked around and saw no one nearby. But during the few seconds it took Angela to unlock and open the door, Roger approached her from behind, pushed her aside, and fled. Hillside staff members chased Roger about half a mile to Interstate Highway 30, where he attempted to hitchhike a ride with passing motorists, first on one side of the freeway and then on the other. As Roger was approached by Hillside personnel and police who had by then joined in pursuit, he leaped into the path of a truck and was killed.

Roger's parents, Albert and Elaine Bossley, sued Dallas County MHMR, Jones, Kamphaus, Urschel, and eight other Hillside employees for wrongful death and on behalf of Roger's estate. Defendants moved for summary judgment on the grounds that because Dallas County MHMR is a governmental unit, TEX. HEALTH & SAFETY CODE § 534.001, it is immune from liability, TEX. CIV. PRAC. & REM.CODE § 101.021(2), and so are its employees, *id.* § 101.106. Plaintiffs responded that their claims came within the statutory waiver of immunity for "personal

injury and death [proximately] caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law". *Id.* § 101.021(2). Specifically, plaintiffs contended that Roger's death was caused by Jones's unlocking the outer door without first locking the inner door or checking on Roger's whereabouts. The district court granted defendants' motion.

Plaintiffs appealed, and the court of appeals reversed the summary judgment. From a statement in *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30, 33 (Tex. 1983), that negligent conduct for which immunity is waived "must involve 'some condition or some use' of tangible property", the court reasoned that the involvement of some condition or use of tangible property is enough for immunity to be waived. 934 S.W.2d at 695. Concluding that Jones's conduct involved the use or condition of the doors to the building, the court remanded the case for further proceedings.

In this Court, defendants contend that they are immune from liability to plaintiffs under Sections 101.021(2) and 101.106 of the Tort Claims Act. The Attorney General has filed an amicus curiae brief, arguing that "[n]egligence in the use or condition of real property does not state a cause of action under the Act, unless it is a premise defect claim under section 101.022(1)." *See University of Texas-Pan American v. Valdez*, 869 S.W.2d 446 (Tex. App. – Corpus Christi 1993, writ denied); *but see City of Waco v. Hester*, 805 S.W.2d 807 (Tex. App. – Waco 1990, writ denied). Defendants do not make this argument, however, and we find it unnecessary to address it. We confine our consideration to the parties' contentions.

II

A

We take as our starting point the premise that in Texas a governmental unit is immune from tort liability unless the Legislature has waived immunity. *Harris County v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994) (citing authorities). The decision as to who should bear responsibility for governmental employees' misconduct should be made by the people's representatives. Therefore, whether a governmental unit is immune from liability for a particular claim depends entirely upon statute. The pertinent statute in this case is the Tort Claims Act, TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109. Before looking at the provision applicable here, it is important to recognize that the Legislature intended the waiver in the Act to be limited, not unlimited, as shown in the history of its passage.

In 1967, the House of Representatives passed H.B. 728, which waived governmental immunity completely. H.J. OF TEX., 60th Leg., R.S. 1271 (1967). But the bill died on a tie vote in the Senate Committee on Jurisprudence. *See* Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462, 467 (1971). Both legislative houses then commissioned interim study committees to consider whether and to what extent governmental immunity should be waived. *See* SENATE INTERIM COMMITTEE TO STUDY GOVERNMENTAL IMMUNITY, REPORT TO THE 61ST LEGISLATURE (1969) (in response to S.R. 733, 61st Leg., R.S. (1967)); HOUSE INTERIM COMMITTEE TO STUDY DOCTRINE OF SOVEREIGN IMMUNITY, REPORT OF THE HOUSE INTERIM COMMITTEE TO STUDY DOCTRINE OF SOVEREIGN IMMUNITY 1969 (in

response to Tex. H.S.R. 396, 60th Leg., R.S. (1967)). Although the interim committees recommended no more than a very limited waiver, Senator Oscar Mauzy and Representative Temple Dickson sponsored bills that would again waive governmental immunity in most circumstances. *See Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 302 (Tex. 1976) (Greenhill, C.J., concurring). While Representative Dickson's bill, H.B. 456, was pending, however, the Legislature enacted H.B. 117, which called for a more limited waiver of immunity. *See id.* H.B. 117 was still too broad for Governor Preston Smith, who vetoed it, explaining that while "the time has arrived when the doctrine of absolute governmental immunity must be reconsidered . . . [H.B. 117] is so broad and all-encompassing in scope as to impose upon the taxpayers of the State of Texas an onerous burden. . . . [A] more limited modification of the doctrine of governmental immunity should be considered by the Legislature." Veto Message of Gov. Smith, Tex. H.B. 117, H.J. OF TEX., 61st Leg., R.S. 1621 (1969). In response, the Legislature passed an amended version of H.B. 456 containing a more restricted waiver of immunity than H.B. 117, which the Governor signed into law as the Tort Claims Act. Tort Claims Act, 61st Leg., R.S., ch. 292, 1969 Tex. Gen. Laws 874 (then codified at TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970)).

The many compromises necessary to pass the Act obscured its meaning, making its application difficult in many cases, including this one. But one thing is clear: the waiver of immunity in the Tort Claims Act is not, and was not intended to be, complete. Arguments for applications of the Act that would essentially result in its waiver

becoming absolute must therefore be rejected as contrary to the Act's fundamental purpose.

B

With this thought in mind, we turn to the language of the Act, which, as respects this case, provides:

> A governmental unit in the state is liable for:
>
> * * *
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE § 101.021(2). For guidance in applying this provision, the court of appeals looked to our decision in *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30 (Tex. 1983), while acknowledging that it has been criticized. 934 S.W.2d at 695 (citing *Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 687-689 (Tex. 1992) (Cornyn, J., dissenting)). The decision in *Salcedo* is limited to its facts. *See University of Texas Medical Branch v. York*, 871 S.W.2d 175, 178 (Tex. 1994) (noting that the waiver of immunity in *Salcedo* arose from the governmental unit's misuse of an electrocardiograph). Moreover, *Salcedo* does not support the court of appeals' conclusion in this case.

In the course of explaining the statutory provision just quoted, we stated in *Salcedo* that negligent conduct for which immunity from liability is waived "must involve 'some condition or some use' of tangible property". 659 S.W.2d at 33. The court of appeals in this case

took our comment in *Salcedo* to mean that for immunity to be waived, "the property . . . does not have to be the instrumentality of harm, it need only be involved." 934 S.W.2d at 695. In other words, the court concluded that some involvement of property is all that is required for immunity to be waived by Section 101.021(2). But we did not say in *Salcedo* that the involvement of property is *sufficient* for waiver of immunity, as the court of appeals concluded; we said only that the involvement of property is *necessary*.

The court of appeals' conclusion contravenes both the purpose and the language of the Act. Section 101.021(2) states that for immunity to be waived, personal injury or death must be proximately caused by a condition or use of tangible personal or real property. The requirement of causation is more than mere involvement, although exactly how much more has been difficult for courts to define. If only involvement were required, the waiver of immunity would be virtually unlimited, since few injuries do not somehow involve tangible personal or real property. Requiring only that a condition or use of property be involved would conflict with the Act's basic purpose of waiving immunity only to a limited degree. *See Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 302-303 (Tex. 1976) (Greenhill, C.J., concurring).

C

Section 101.021(2) requires that for immunity to be waived, personal injury or death must be proximately caused by the condition or use of tangible property. Plaintiffs here complain of both a use of property – Jones's

unlocking the outer door without looking for Roger – and a condition of property – the unlocked inner door. Neither can be said to have caused Roger's suicide. Property does not cause injury if it does no more than furnish the condition that makes the injury possible. *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995). The unlocked doors permitted Roger's escape but did not cause his death. After fleeing Hillside, Roger ran half a mile and then attempted to hitchhike on both sides of a freeway. Only when he was about to be apprehended did he leap in front of an oncoming truck. Although Roger's escape through the unlocked doors was part of a sequence of events that ended in his suicide, the use and condition of the doors were too attenuated from Roger's death to be said to have caused it.

The court of appeals analogized this case to *Overton Memorial Hospital v. McGuire*, 518 S.W.2d 528 (Tex. 1975), where we held that immunity was waived by Section 101.021(2) for plaintiff's claim that he was injured when he fell out of his hospital bed because it was not equipped with side rails. There, however, plaintiff's injury was immediate and directly related to the absence of restraints on the side of the bed. Roger's death was distant geographically, temporally, and causally from the open doors at Hillside.

Plaintiffs also argue that this case is analogous to *Lowe* and to *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169 (Tex. 1989). *Lowe* held that immunity was waived for a claim by a football player that his coach refused to allow him to wear a knee brace. 540 S.W.2d at 300. *Robinson* held that immunity was waived for a claim that a mentally handicapped young man was allowed to

swim without a life preserver. 780 S.W.2d at 171. We have held that "[t]he precedential value of these cases is . . . limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff's injuries." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585 (Tex. 1995). The Hillside Center cannot be said to lack an integral safety component because its interior doors were unlocked in accordance with its open door policy.

The real substance of plaintiffs' complaint is that Roger's death was caused, not by the condition or use of property, but by the failure of Hillside's staff to restrain him once they learned he was still suicidal. The Tort Claims Act does not waive Dallas County MHMR's immunity from such a complaint.

III

The individual defendants contend that because plaintiffs' claim against their employer, Dallas County MHMR, is barred by governmental immunity, plaintiffs' claims against them are also barred by Section 101.106 of the Tort Claims Act, which states: "A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." Plaintiffs initially argue that defendants cannot assert the bar of Section 101.106 until the Bossleys have obtained a judgment *against*, or settled with, Dallas County MHMR. But the immunity conveyed to a governmental unit's

employees by Section 101.106 is triggered by *any* judgment in an action against a governmental unit, including a judgment in favor of the governmental unit. *Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997). Since we have concluded that judgment must be rendered for Dallas County MHMR, judgment must also be rendered for its employees if Section 101.106 applies.

Plaintiffs also argue that Section 101.106 provides immunity only to Jones because she is the only Dallas County MHMR employee "whose act or omission gave rise to the claim." But plaintiffs read "claim" too narrowly. Their claim against Dallas County MHMR is not simply that one of its employees allowed Roger to escape; rather, they claim that the conduct of all the defendants caused Roger's death. A claimant cannot limit the immunity conveyed by Section 101.106 by singling out one employee's conduct on which to base liability of the governmental unit. All employees whose acts or omissions gave rise to the claim against the governmental unit are entitled to immunity, regardless of whether the claimant complains of their conduct.

Finally, plaintiffs argue that Section 101.106 does not apply because their action against the individual defendants does not "involve[ ] the same subject matter" as their action against Dallas County MHMR. The Federal Tort Claims Act contains a similar provision: "[t]he judgment in [a Federal Tort Claims Act] action . . . shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. The phrase, "by reason of the same subject matter", has been defined to

mean "arising out of the same actions, transactions, or occurrences." *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir.), *cert denied*, 479 U.S. 826, 107 S.Ct. 103, 93 L.Ed.2d 53 (1986); *see Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994). We think the similar phrase in Section 101.106 means the same thing, and the courts of appeals that have addressed the issue agree. *See White v. Annis*, 864 S.W.2d 127, 131 (Tex. App. – Dallas 1993, writ denied); *Bell v. Love*, 923 S.W.2d 229, 233 (Tex. App. – Houston [14th Dist.] 1996, no writ). Clearly, plaintiffs' claims against Dallas County MHMR and the individual defendants all arise out of the same actions and occurrences.

We thus conclude that under Section 101.106 all of the individual defendants are immune from liability to plaintiffs.

* * * * *

For the reasons we have explained, the judgment of the court of appeals is reversed and judgment is rendered that plaintiffs take nothing.

Nathan L. Hecht
Justice

Opinion delivered: April 14, 1998

IN THE SUPREME COURT OF TEXAS

No. 97-0028

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL., PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ROGER ARTHUR BOSSLEY, DECEASED, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on November 4, 1997

JUSTICE ABBOTT, joined by JUSTICE SPECTOR, dissenting.

The Court concludes that "the use and condition of the doors were too attenuated from Roger's death to be said to have caused it." In doing so, the Court's analysis ignores the traditional proximate cause elements of cause in fact and foreseeability. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Instead, the Court focuses only on immediacy. Because I disagree with the standard applied by the Court and because application of the traditional standard compels a conclusion that a fact issue exists with regard to proximate cause, I dissent.

"Cause in fact" means the act or omission was a substantial factor in bringing about the injury and, without it, harm would not have occurred. *Travis*, 830 S.W.2d at 98. "Foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers his or her negligent act created for others. Foreseeability does not require that the person or entity who creates the dangerous situation anticipate the precise manner in which the injury occurs. *Id.* An intervening act of a third party will not excuse the first wrongdoer if such act should have been foreseen. *Northwest Mall, Inc. v. Lubri-Lon Int'l, Inc.*, 681 S.W.2d 797, 803 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

The summary judgment evidence raised a genuine issue of material fact on the foreseeability of Roger Bossley's suicide that included: (1) Bossley was being treated because he had attempted suicide; (2) he still exhibited suicidal tendencies and threatened to kill himself upon his release from the facility; (3) the doctors decided he was of sufficient danger to himself that he should not be released and needed a more restricted environment; (4) Bossley knew that his transfer from Hillside was likely to result in his being committed to the state hospital; (5) he expressed fear of going to the state hospital; (6) on the morning of his suicide, the Dallas MHMR employees discussed the fact that Bossley had a great fear of going to the state hospital and he might elope to avoid being transferred; (7) MHMR's policy was to lock both front doors to keep inside any patient about to be transferred to a more restricted facility; (8) Angela Jones knew that the front door was supposed to be locked to prevent

patients from "running out in the street" to harm themselves.

The summary judgment evidence also raised material fact issues concerning whether the use or condition of the doors was the cause in fact of Bossley's suicide: (1) Bossley was not constantly monitored; (2) Jones knew that because the inner (self-locking) door was opened, someone could run out the outer door when she opened it; (3) Jones opened the outer door without determining Bossley's location; and (4) Bossley escaped through the open door.

While it is true that the doors did not injure Bossley by actually physically striking him, that is not the test. The test is simply whether the doors were a proximate cause of Bossley's injury. Fact issues clearly exist concerning whether the use or condition of the doors was a substantial factor in bringing about Bossley's injury. Absent the use or condition of the doors, Bossley would still be in the hospital – he would have never escaped and would not have had the opportunity to jump in front of a truck.

The Court's claim that the suicide was too attenuated from the use or condition of the doors is weak, at best. It is not as if the suicide occurred later in the day or would not have occurred but for some intervening cause. As the Court notes, after Bossley escaped through the doors:

> Hillside staff members chased Roger about half a mile to Interstate Highway 30, where he attempted to hitchhike a ride with passing motorists, first on one side of the freeway and then on the other. As Roger was approached by Hillside personnel and police who had by then

> joined in pursuit, he leaped into the path of a truck and was killed.

Before, during, and after Bossley burst through the doors, he seemed fixated on one end: suicide. As previously noted, Bossley was at the facility because he had attempted suicide; he still exhibited suicidal tendencies while at the facility; and he threatened to kill himself upon his release from the facility. When the use or condition of the doors provided Bossley the opportunity to act on his threats, he took it. In a fast-paced and continuous sequence, the suicide occurred directly and shortly after Bossley eloped through the doors. It seems that he killed himself with the first available instrumentality of death. Under these circumstances, a court cannot say – as a matter of law – that the use or condition of the doors was not a proximate cause of Bossley's death. At a minimum, a fact issue exists on proximate cause.

The non-doctor Petitioners claim that a finding of proximate cause in this case

> [W]ould set a precedent leading to ridiculous results. For instance, claims would exist for Bossley's use of the roadways and the freeway to get to the location of the suicide; for the use of the floor of the facility, upon which Bossley and Ms. Jones walked; for the "use" of the phone, which helped to secret his escape; for use of the keys Ms. Jones "used" in the door; for the clothing Ms. Jones wore, which Bossley grabbed in an attempt to overpower her, among other [things].

The non-doctor Petitioners' concerns are unfounded. There is no evidence in the record that use of the

roadway, the floor, the phone, the keys, or Ms. Jones's clothing was a foreseeable cause of injury to Bossley. Conversely, foreseeable injury resulting from the use or condition of the doors is almost established as a matter of law. The very reason the special doors existed was to prevent the high risk of elopement and potential suicide. In contrast, the facility obviously did not contemplate using special floors, phones, etc., to deter elopement and suicide.

Also, the non-doctor Petitioners disingenuously argue that the use or condition of the Hillside doors could not be the proximate cause of Bossley's suicide because suicide is an intervening cause as a matter of law. *See* TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2). The Petitioners omit the remaining portion of section 93.001(a)(2) which states that suicide shall not be an affirmative defense if the suicide was "caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard." TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2). As this Court made clear in *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994), this section is no defense if the health care workers failed to comply with the standard of care, and their failure was a cause of the patient's suicide. *Id.* at 12. Summary judgment is improper because there is a genuine issue of material fact concerning whether the defendants complied with the applicable legal standard of care.

/s/ _____
GREG ABBOTT
JUSTICE

OPINION DELIVERED: April 14, 1998

IN THE SUPREME COURT OF TEXAS

No. 97-0028

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,
PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ROGER ARTHUR BOSSLEY, DECEASED,
RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fifth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) Judgment is rendered that Albert Bossley, individually, Elaine Bossley, individually, and as representatives of the Estate of Roger Arthur Bossley, take nothing;

3) Dallas County Mental Health and Mental Retardation, et al., shall recover from Albert Bossley, individually, Elaine Bossley, individually, and as representatives of the Estate of Roger Arthur Bossley, who shall pay the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Fifth District and to the District Court of Dallas County, Texas, for observance.

(Opinion by Justice Hecht, joined by Chief Justice Phillips, Justice Gonzalez, Justice Enoch, Justice Owen, Justice Baker, and Justice Hankinson)

(Dissenting Opinion by Justice Abbot, joined by Justice Spector)

April 14, 1998

****

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RE: Case Number 97-0028
court of Appeals Number: 05-91-00284-CV
Trial Court Number: 89-03922-J

Style: DALLAS COUNTY MENTAL HEALTH and MENTAL RETARDATION, et al.
v.
ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as representatives of the estate of ROGER ARTHUR BOSSLEY, deceased

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

Reversed and Remanded and Opinion filed February 17, 1995.

[LOGO]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY AND ELAINE BOSSLEY,
Individually and
as Representatives of the
ESTATE OF ROGER ARTHUR BOSSLEY, Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION ET AL., Appellees

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On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. 89-03922-J

OPINION

Before Chief Justice THOMAS,[1] and Justices CHAPMAN and KAPLAN[2]
Opinion By Chief Justice Thomas

This appeal presents another opportunity for the courts to struggle with determining what constitutes a

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[1] The Honorable Linda Thomas was on the original panel at the time this cause was submitted for decision. Justice Thomas was sworn in as Chief Justice on January 1, 1995.

[2] Justice Jeff Kaplan participated in this case at the time it was submitted for decision. He did not, however, participate in the issuance of this opinion.

condition or *use of tangible property* as those terms are used in the Texas Tort Claims Act (the Act). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986). The case presents the same dilemma expressed nineteen years ago by Chief Justice Greenhill when he said, "Our problem is trying to determine what the Legislature meant." *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 303 (Tex. 1976) (Greenhill, C.J., concurring). Although the question of what constitutes the parameters of governmental immunity under the Act has been raised innumerable times, we seem to stay in a stall pattern, whipped in whichever direction a case may push a particular court or courts.

In this wrongful death suit, Albert and Elaine Bossley, individually and as representatives of the estate of Roger Arthur Bossley, deceased, appeal from a summary judgment granted in favor of Dallas County Mental Health and Mental Retardation (Dallas MHMR), John Kamphaus, M.D., Harold Urschel, M.D., Dora Pogue, R.N., Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davilla, Patricia Prince, and Angela Jones. Appellants based their action on negligence. Appellees separately moved for summary judgment on the basis of sovereign immunity, official immunity, lack of proximate cause, and a statutory cap on damages. In four points of error, appellants generally contend the trial court erred in granting summary judgment. For the reasons set forth below, we reverse the trial court's judgment. Accordingly, we remand the cause to the trial court for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

In July 1988, Roger Bossley was suffering from major depression and unsuccessfully attempted suicide. Roger was taken to Parkland Memorial Hospital, transferred to the Mental Diagnostic Center, and eventually transferred to Hillside Center, a treatment facility owned and operated by Dallas MHMR. Hillside is an "open" facility where patients have considerable freedom of movement. In fact, during Roger's residency, he had weekend passes and the ability to go on various outings, job interviews, and other activities away from the unit. Roger was a Hillside patient from July 25, 1988 until his death on August 12, 1988.

On August 9, Roger asked another patient where he could get a gun so he could kill himself when he got out. The patient immediately reported Roger's statement to Dr. Urschel, one of the treating physicians. Dr. Urschel noted in Roger's chart that he considered Roger to be "a definite risk to himself." Because of the need for a more restrictive environment, Dr. Kamphaus, another treating physician, ordered on August 11 that Roger be returned to the Mental Diagnostic Center for further evaluation. The transfer documents indicated that Roger remained suicidal despite his stay at Hillside.

Because it was not uncommon for patients to oppose being transferred to a more restrictive facility, Hillside had a regular practice of locking the front door of the residential unit when protective orders had been signed by a doctor and paperwork had been transmitted to the court. Thus, the outer door was locked after Dr. Kamphaus signed Roger's transfer documents. The unit

also has a self-locking, inner glass door that is sometimes locked as a precautionary measure. Although Dr. Urschel considered ordering suicide and elopement precautions in this instance, he did not do so. Further, no one else ordered such precautions. Consequently, the inner door was not locked.

Although the doctors and some of the employees did not consider Roger an elopement risk, the summary-judgment evidence established that everyone considered him a risk to himself if he was released at that point. Apparently, Roger knew the transfer to the Mental Diagnostic Center would likely result in his being committed to Terrell State Hospital. In fact, Roger discussed with some of the appellees his fears about being transferred to Terrell. There was a noticeable change in Roger's behavior on the morning of his death. During the shift-change conference on the morning of Roger's escape, the Dallas MHMR employees discussed Roger's fear of going to Terrell. Further, they discussed that Roger might try to escape to avoid being transferred. At least one Dallas MHMR employee admitted that someone suffering from "major depression," who is considered to be suicidal, can be irrational and unpredictable.

On August 12, Angela Jones, a Hillside employee, returned to Roger's residential unit to get her purse so she could go to lunch. She saw Roger talking on the telephone, which was located in the hallway on the men's wing. Ms. Jones observed Roger for a few seconds and then started toward the door. Although Ms. Jones knew Roger was restricted to the unit, she did not tell anyone to watch him as she began to leave. She explained she was not the employee responsible for Roger at the time.

Ms. Jones stated she did not recall seeing anyone watching Roger. She further admitted that if no one was watching him, she should have called out to someone before starting toward the door.

Ms. Jones first passed through the inner door that was closed, but unlocked. Once she got to the front door, Ms. Jones stated she looked around before beginning to unlock the door. She admitted, however, that the hallway area of the men's unit where the telephones are located could not be seen from the front door. Thus, she did not know Roger's location as she began to unlock the door. During the few seconds that it took to unlock the outer door and begin to open it, Ms. Jones heard footsteps behind her. At that point, Roger overpowered Ms. Jones and escaped through the open door.

Roger ran to Interstate Highway 30, approximately one-half mile from Hillside. He initially began to hitchhike toward Dallas. Upon being approached by a Hillside employee, Roger ran across the interstate and proceeded to hitchhike toward Fort Worth. As Dallas MHMR employees and the police began to approach Roger, he looked toward the employees, back to the police, and then toward an oncoming truck. Roger then jumped in front of the truck. He was killed on impact.

STANDARD OF REVIEW

In reviewing a summary-judgment record, we apply the following standards:

1. The movant for summary judgment has the burden of showing there is no genuine issue

of material fact and that it is entitled to judgment as a matter of law.

2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true.

3. Every reasonable inference must be indulged in the nonmovant's favor and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). For a defendant, as movant, to prevail on summary judgment, it must either disprove at least one element of the plaintiff's theory of recovery or plead and conclusively establish each essential element of an affirmative defense, thereby rebutting the plaintiff's cause of action. *International Union UAW Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 563 (Tex. App. – Dallas 1991, writ denied). A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982).

Once the movant has established a right to summary judgment on the issues presented, the nonmovant has the burden to respond by presenting evidence that raises genuine issues of material fact. *Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 215 (Tex. App. – Houston [1st Dist.] 1986, no writ). When a summary-judgment order does not specify the grounds on which it was granted, the order will be upheld on any ground asserted in the

motion that meets the above criteria.[3] *See Tilotta v. Goodall*, 752 S.W.2d 160, 161 (Tex. App. – Houston [1st Dist.] 1988, writ denied).

APPELLANTS' ALLEGATIONS

The negligence allegations asserted against appellees are grouped and briefly summarized.

1. The Doctors

Dr. Urschel failed to take immediate action by either communicating with Dr. Kamphaus or ordering a transfer when he learned about Roger's comments. Both doctors failed to order suicide or elopement precautions. Further, they did not order that the outer and inner doors remain locked until Roger was transferred. Lastly, the doctors failed to order that Roger be placed in the seclusion room.

2. Dallas MHMR Employees[4]

They failed to adequately communicate Roger's suicidal condition and elopement risk to other staff members. Further, they failed to keep the inner door locked and failed to order any type of suicide or elopement

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[3] Because our order does not specify the grounds upon which the summary judgment was granted, appellants attacked each of the grounds raised. We will not discuss the points of error in the same order as presented by appellants.

[4] This includes all of the named employees except Ms. Jones. The allegations against her are treated as a separate group.

precautions after they knew or should have known that Roger was suicidal and an elopement risk. Further, they failed to have someone monitor Roger and keep him within sight at all times while he was awaiting transfer.

3. Ms. Jones

Ms. Jones opened the door when she knew or should have known that Roger had access to the doorway because no one was monitoring him. Further, she opened the door without checking Roger's location or ensuring that the inner door was closed and locked. Finally, she did these acts when it was known that Roger was suicidal and an elopement risk.

GOVERNMENTAL IMMUNITY

Appellants attack the summary judgment on the basis of governmental immunity, contending this defense is not available or, alternatively, that genuine issues of material fact were raised relative to the applicability of the defense.

1. Elements of Governmental Immunity

Under the Texas Tort Claims Act, the sovereign[5] is not liable for damages unless the alleged negligent or wrongful act falls within one of the statutorily defined exceptions. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1986 & Supp. 1995). Generally

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[5] It is undisputed that Dallas MHMR is a governmental entity to which the doctrine of governmental immunity applies.

speaking, the waiver of governmental immunity arises in three areas: use of publicly owned vehicles, premises defects, and injuries arising from conditions or use of property. *See* Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEXAS L. REV. 462, 468 (1971). Appellants' cause of action could apply only to the last category of the Act, which provides in relevant part:

> A governmental unit in the state is liable for:
>
> (2) personal injury and death so caused by a *condition or use of tangible* personal or real *property* if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986) (emphasis added).

To allege a claim involving the "condition" of property, it is sufficient to allege that defective or inadequate property contributed to the injury. *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 31-2 (Tex. 1983). To state a claim involving the "use" of nondefective property, a party must allege the property was used or misused by an employee acting within the scope of employment so as to cause injury. *Salcedo*, 659 S.W.2d at 32. A nonuse of property does not trigger the waiver provision of the statute. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994).

2. Appellants' Contentions

Appellants claim they have stated a cause of action under the Act because their negligence allegations involve both a condition and a use of tangible property.

Specifically, they assert that within the definitional terms of the Act,

> the "condition" of the inner door (unlocked and open) and the "use" of the outer door by a [Hillside] employee (unlocking and opening the door without checking [Roger's] location or ensuring that the inner door was locked) proximately caused [Roger's] death by allowing him to escape the facility in a known suicidal condition.

Appellants assert that properly locked doors at Hillside were a part of Roger's required "protective equipment." Thus, they argue this case is controlled by *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169 (Tex. 1989) (failing to provide patient with life preserver was condition or use of tangible property within meaning of Act); *Lowe*, 540 S.W.2d at 297 (failing to furnish equipment for injured knee states cause of action under Act); and *Overton Memorial Hosp. v. McGuire*, 518 S.W.2d 528 (Tex. 1975) (per curiam) (failing to provide sideboards or guards on hospital bed was cause of action within Act). Appellants further point out the property does not have to be the instrumentality of harm; rather, it only has to be involved. *See Salcedo*, 659 S.W.2d 30 (establishing use or misuse of tangible property itself proximately caused injuries not required).

3. Appellees' Contentions

Appellees generally contend that, at best, the allegations assert a failure to properly diagnose and treat which resulted in a "failure to order" the use of tangible property. They assert that many of the allegations are actually

complaints about "errors in judgment." In addressing the issue of the doors, appellees argue the doors just happen to be pieces of property that "appear" in this lawsuit; the doors did not cause Roger's death. Appellees further characterize the unlocked inner door as constituting a "nonuse" of property rather than a use of property as required under the Act. Finally, they argue this case should be decided on the same basis as *Weeks v. Harris County Hosp. Dist.*, 785 S.W.2d 169 (Tex. App. – Houston [14th Dist.] 1990, writ denied) (failing to restrain mental patient was not use or misuse of property under Act).

4. Application of Law to Facts

We note initially that with regard to proximate cause, the Texas Supreme Court in 1983 expanded the scope of governmental immunity to include wrongful conduct that involves misuse of property. *See Salcedo*, 659 S.W.2d at 33; *Huckabay v. Irving Hosp. Found.*, 802 S.W.2d 758 (Tex. App. – Dallas 1990, writ denied). The *Salcedo* court held that an "allegation of defective or inadequate tangible property is not necessary to state a cause of action under the Act if 'some use' of the property, rather than 'some condition' of the property, is alleged to be a contributing factor to the injury." *Salcedo*, 659 S.W.2d at 32. In construing the Act, the court explained that the negligent act of the government employee or officer must be the *proximate cause* of the injury, and the negligent conduct must *involve* "some condition or some use" of tangible property. *See University of Tex. Medical Branch v. York*, 871 S.W.2d 175, 178 n.5 (Tex. 1994) (explaining *Salcedo*). Although *Salcedo* has since been criticized, *see Texas Dep't of MHMR v. Petty*, 848 S.W.2d 680, 687-89 (Tex. 1992) (Cornyn, J., dissenting),

it has not been overruled. Thus, contrary to Dallas MHMR's assertion, the property in this case does not have to be the instrumentality of harm, it need only be involved. Accordingly, for there to be a waiver of governmental immunity, appellants had to assert (i) an actionable theory of recovery (ii) that involved a use or condition (iii) of tangible property.

Appellants have alleged a negligence action; thus, they have asserted an actionable theory of recovery. Determining what constitutes tangible property, however, is an area that has caused considerable problems for our courts. *See Petty*, 848 S.W.2d at 688 n.9 (Cornyn, J., dissenting). For purposes of this opinion, we adopt the definition used by the San Antonio Court of Appeals that tangible property is "property that is capable of being handled, touched, or seen." *See Robinson v. City of San Antonio*, 727 S.W.2d 40, 43 (Tex. App. – San Antonio 1987, writ ref'd n.r.e.). The doors are capable of being handled, touched, and seen. Thus, the doors are tangible pieces of property.

The question remaining is whether the alleged negligent conduct *involved* "some condition or some use" of tangible property, *i.e.*, the doors, under circumstances where there would be private liability. We will address appellants' allegations that the "use" of the outer door by an employee and the "condition" (unlocked and open) of the inner glass door subject Dallas MHMR to liability.

A. Use of Outer Door

Appellants alleged Hillside employee Angela Jones negligently unlocked and opened the front door without

checking Roger's location. Appellants assert this act of negligence allowed Roger to escape and later commit suicide. Assuming, as we must in the context of summary judgment, that Jones was negligent in unlocking and opening the door, we conclude appellants have asserted conduct that involved "some condition or some use" of property. In doing so, we disagree with appellees' characterization of Jones's act as a failure to keep a proper lookout or a failure to monitor or ascertain Roger's location, and not a use of the door. The question is whether her conduct in opening the door involved a use of property. Jones used the door, and Roger was able to flee the facility. Thus, we conclude Jones's conduct involved a use of property, *i.e.*, the outer door.

B. Condition of Inner Door

More problematic, however, is the issue of whether the self-locking, inner glass door constituted a defective condition as opposed to the nonuse of a lock. Cases interpreting whether a claim involves a condition or use of property reflect the problems our courts have had in determining the extent of liability. Because of the inconsistencies in the case law regarding whether a cause of action falls in the Act's provision, we are given plenty of options but little direction as the various fact situations are presented.[6]

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[6] *Compare Brantley v. City of Dallas*, 545 S.W.2d 284 (Tex. Civ. App. – Amarillo 1976, writ ref'd n.r.e.) *with Green v. City of Dallas*, 665 S.W.2d 567 (Tex. App. – El Paso 1984, no writ). Both cases involved alleged negligence on the part of emergency medical technicians. In each instance, the paramedics used

Nevertheless, we agree with appellants that this case is most similar to *Overton*. In *Overton*, a hospital patient

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items of property, such as sphygmomanometers and stethoscopes. After the examinations, the paramedics refused to transport the patients to the hospital. Brantley transported himself to the hospital for treatment. Green died en route to the hospital as the paramedics were working on him during a second call. Green's wife and Brantley sued the City of Dallas. In Brantley's case, the court determined he did not state a cause of action under the Act because he did not allege an erroneous judgment was made because of negligence in the use of the property or because of a defect in the equipment. By contrast, Mrs. Green was allowed to pursue her action against the city under the Act because the court determined that the failure to use the various items of cardiac equipment located in the ambulance during the first examination constituted an improper use of property. The difference in the right to recover was that the *Green* court determined Mrs. Green stated a "use" cause of action while the *Brantley* court concluded Brantley's allegations constituted a "nonuse" of property.

The problem was most recently illustrated by the supreme court's decision in *Kassen*. In concurring and dissenting opinions, two justices disagreed with the majority's conclusion that the plaintiffs had not stated a cause of action under the Act. *See Kassen*, 887 S.W.2d at 15. In *Kassen*, Parkland Memorial Hospital agents confiscated a woman's medication. The woman demanded the return of her medication and threatened to throw herself in front of a car if she did not receive the pills. The hospital refused, and the woman left the hospital and committed suicide by throwing herself into freeway traffic. The majority concluded that the plaintiffs did not allege an injury arising from the "use" of medication; rather, plaintiffs alleged a nonuse case. Chief Justice Phillips and Justice Gammage both dissented on this point. *Kassen*, 887 S.W.2d at 15 (Phillips, C.J., dissenting) ("If defendants had really 'not used' the medication, it would have remained in [the woman's] possession, not theirs."), (Gammage, J., dissenting) ("I am incredulous that the majority call it a 'non-use' of tangible physical property to

was injured after falling from a bed not equipped with protective side rails. The supreme court assumed, for purposes of summary judgment, that the hospital had a duty to install the rails and was negligent for failing to do so. Thus, the court concluded that "injuries proximately caused by negligently providing a bed without bed rails are proximately caused from some condition or some use of tangible property." *Overton*, 518 S.W.2d at 529.

Like the bed in *Overton*, the *self-locking*, inner glass door in this case was inadequate or defective for its purpose, when we assume, as we must in the context of summary judgment, that the door was negligently unlocked. The door was *self locking*, which suggests that it should automatically lock when closed, unless the lock mechanism is disengaged or the door is propped open. Consequently, the very design of the door had to be altered. A jury could conclude that a given purpose of a self-locking door is to prevent patients from walking freely through that door to the outer area of the facility. We acknowledge Hillside is an open facility; however, it apparently planned for circumstances when patients could not freely move in and out of the facility.

In this case, Dallas MHMR provided Hillside as a holding area for Roger until he could be transported back

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confiscate medication prescribed by other physicians from the owner for whom it was prescribed, and then knowingly and consciously *withhold* it from her.").

For an extensive review of the cases interpreting whether a claim is sufficient to state a cause of action under the Act, *see Hatley v. Kassen*, 859 S.W.2d 367, 377 nn.7 & 8 (Tex. App. – Dallas 1992), *aff'd in part, rev'd in part*, 887 S.W.2d 4 (Tex. 1994).

to the Mental Diagnostic Center by sheriff's deputies. This was because of concerns that Roger was a serious threat to himself. Nevertheless, the inner self-locking door was unlocked (although the outer door was ordered locked), and Roger was allowed to escape. By unlocking the inner door, the door was defectively incomplete for its intended purpose. In the context of a summary judgment, we must presume the conduct of the doctors and staff in failing to ensure that the door remained locked was negligent. Accordingly, we conclude the alleged negligent conduct involved a "condition" of property, as opposed to a nonuse of property.

In reaching this conclusion, we necessarily reject the argument that *Weeks* compels a contrary disposition. *Weeks* also involved a woman who committed suicide after walking away from a hospital. Unlike Roger, however, the "patient" in *Weeks* had not been formally admitted to the hospital, and the appellants had no intention of admitting her into the facility. *Weeks*, 785 S.W.2d at 171. Thus, the hospital had not assumed a duty of care for the patient in *Weeks*, while Dallas MHMR had assumed such a duty with respect to Roger.

We hold that Dallas MHMR failed to conclusively establish that Roger's death was not caused by a condition or use of tangible property. Thus, summary judgment based on governmental immunity was improper. We sustain the second point of error.

OFFICIAL IMMUNITY

Appellants also attack the summary judgment on the basis of official immunity, asserting this affirmative

defense does not apply to the Dallas MHMR doctors and employees. Alternatively, they argue fact issues exist on whether these appellees are entitled to benefit from this defense.

1. Elements of Official Immunity

Official immunity is a common-law defense that protects government officers and employees from personal liability in performing discretionary duties in good faith within the scope of their authority. *Kassen*, 887 S.W.2d at 8; *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Whether a government officer or employee enjoys immunity from tort liability is a separate question from the immunity of the sovereign itself. *Baker v. Story*, 621 S.W.2d 639, 643 (Tex. Civ. App. – San Antonio 1981, writ ref'd n.r.e.). If a plaintiff has a right of action against the government due to the state's waiver of sovereign immunity, this right is not affected by whether a government employee has official immunity. *Kassen*, 887 S.W.2d at 8.

For summary judgment to be proper, appellees had to conclusively establish the official immunity defense. To establish official immunity, appellees had to show (i) they performed discretionary functions (ii) in good faith (iii) within the scope of their authority as employees of Dallas MHMR. *Kassen*, 887 S.W.2d at 9. The parties do not dispute that elements two and three were met. The issue is whether appellees were performing "discretionary" functions entitling them to official immunity.

If an action involves personal deliberation, decision, and judgment, it is discretionary; actions that require obedience to orders or the performance of a duty to

which the actor has no choice are ministerial. *City of Lancaster*, 883 S.W.2d at 654. In other words, discretionary functions receive protection; ministerial duties do not. *Kassen*, 887 S.W.2d at 9. Although official immunity ordinarily extends to any "discretionary" act or decision by a government employee, not all discretionary acts performed by government-employed medical personnel are entitled to official immunity. Under the Texas Supreme Court's recent decision in *Kassen*, *medical* discretion is distinguished from *governmental* discretion when applying the doctrine of official immunity to government-employed medical personnel. Government-employed medical workers are immune from claims arising out of the exercise of *governmental* discretion but are not immune from liability arising from the exercise of *medical* discretion. *See Kassen*, 887 S.W.2d at 11. Thus, the question is whether appellees' exercise of discretion was medical or governmental.

2. Application of Law to Facts

The crux of appellants' complaint is that Roger was allowed to escape from Hillside because of the negligence of Dallas MHMR workers and doctors in failing to properly secure the facility when they knew Roger was a high risk for suicide.

In their motions for summary judgment, the doctors and Dallas MHMR workers describe their duties as (i) gathering information on individual patients, (ii) evaluating that information, and (iii) making a decision based on that information. The doctors stated these duties required "deliberation and *exercise of . . . professional judgment* in

the care and treatment of . . . patients." (Emphasis added.) Likewise, the Dallas MHMR workers stated these duties required "deliberation and exercise of . . . judgment, *professional and otherwise*, in the care and treatment of . . . patients including Roger Arthur Bossley." (Emphasis added.)

We conclude, based on these affidavits, that at all relevant times, appellees were exercising medical rather than governmental discretion. Nothing in appellees' affidavits suggests that governmental factors or concerns colored appellees' discretion in failing to ensure that Roger could not escape prior to his transfer. Because there is nothing in the affidavits to suggest the discretion was anything but medical, we conclude appellees failed to conclusively prove that they exercised governmental discretion. Consequently, the trial court erred in granting summary judgment on this ground. We sustain the first point of error.

PROXIMATE CAUSE

Appellants further attack the summary-judgment order on the basis of lack of proximate cause. They contend they raised genuine issues of material fact as to whether appellees' negligence proximately caused Roger's death and, thus, summary judgment was improper.

1. Elements of Proximate Cause

The two elements of proximate cause are cause in fact and foreseeability. "Cause in fact" means the act or omission was a substantial factor in bringing about the injury, and without it, harm would not have occurred. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). "Foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers his or her negligent act created for others. Foreseeability does not require an individual to anticipate the precise manner in which injury will occur once the person has created a dangerous situation through negligence. *Travis*, 830 S.W.2d at 98. An intervening action of a third party will not excuse the first wrongdoer if such act should have been foreseen. *Northwest Mall, Inc. v. Lubri-Lon Int'l, Inc.*, 681 S.W.2d 797, 803 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

2. Parties Contentions

Appellants contend Roger's self-destructive act was foreseeable. They point out Roger's suicide was the precise action the appellee-doctors were attempting to avoid by ordering him transferred to the Mental Diagnostic Center. Further, the employee-appellees were responsible for preventing this occurrence.

Appellees contend the actual cause of Roger's death (impact with a vehicle) was too remote to be connected with the negligence of Ms. Jones and the other appellees in failing to take proper suicide precautions.

3. Application of Law to Facts

The summary-judgment evidence established that: (a) Roger was being treated because he had attempted suicide; (b) he still exhibited suicidal tendencies; (c) the doctor-appellees decided he was a sufficient danger to himself that he needed a more secure environment; (d) Roger knew his transfer from Hillside was likely to result in his being committed to Terrell; (e) Roger expressed fear of going to Terrell; (f) on the morning of his suicide, the Dallas MHMR employees discussed the fact that Roger might be an elopement risk to avoid being transferred; (g) Roger was not constantly monitored; (h) appellee Jones opened the door without determining Roger's location; (i) she knew that because the inner door was unlocked, someone could run out the outer door when she opened it; and (j) Roger escaped through the open door. We conclude, based on this evidence, that material fact issues exist on the proximate cause of Roger's death. Therefore, the trial court improperly granted summary judgment on this basis. We sustain the third point of error.

CAP ON DAMAGES

In their final point of error, appellants complain the trial court erred in granting summary judgment on the ground that the Act limits damages to $100,000. Appellees pleaded this ground in the event the trial court found they were not immune from suit. The trial court, however, found appellees were immune from suit. Consequently, the trial court did not address the issue of the statutory cap on damages.

It is fundamental that a court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe or to decide a case on speculative, hypothetical, or contingent fact situations. *Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988). Because the amount of damages to be assessed in this case is contingent on a finding of liability and no such finding has yet been made, we conclude this point of error would require us to issue an advisory opinion. Accordingly, we will not address the issue of a statutory cap on damages.

SUMMARY

This case is yet another instance illuminating the ultimate private-public controversy in our political and legal systems: the privilege of governmental immunity versus the protection of the individual. The dilemma we face in seeking closure, however, is that the law regarding governmental use or nonuse of tangible property remains unclear, despite the supreme court's latest attempt to provide clear guidelines to trial judges and appellate courts.

The state government and the innumerable ancillary governmental agencies that serve the more than seventeen-and-a-half million people within Texas are obliged to perform their duties properly. On the occasions that they do not do so, under the present case law, there can be too much discretion on one side and too little consideration for the other. A rule of law should not be applied one way in one region and operate in an opposite way in another region. A standard of fairness and the right of recovery for injuries should not depend upon the victim's

geographic location. The only remedy is the establishment of uniformity through consistency in definitions and application. We agree with former Chief Justice Greenhill that whether the waiver is narrow or broad, our courts must have a standard against which to make an appropriate judgment. *See Lowe*, 540 S.W.2d at 303 (Greenhill, C.J., concurring).

We reverse the trial court's judgment and remand the cause to the trial court for further proceedings consistent with this opinion.

/s/ Linda Thomas
LINDA THOMAS
CHIEF JUSTICE

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Tex. R. App. P. 90
910284F.P05

Motion for Rehearing Denied and Supplemental Opinion Filed October 9, 1996

[LOGO]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY AND ELAINE BOSSLEY, Individually and as Representatives of the ESTATE OF ROGER ARTHUR BOSSLEY, Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION ET AL., Appellees

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On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. 89-03922-J

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

Before Chief Justice Thomas and Justice Chapman
Opinion by Chief Justice Thomas

On February 17, 1995, we reversed the trial court's summary judgment in the above-numbered cause and remanded to the trial court for further proceedings. *Bossley v. Dallas County Mental Health Mental* [sic] *& Mental Retardation*, No. 05-91-00284-CV (Tex.App. – Dallas 1995). On March 6, 1995 and March 13, 1995, appellees filed

motions for rehearing raising for the first time this Court's jurisdiction to render a decision in this case.[1]

Specifically, appellees contend that appellants nonsuited MHMR prior to the trial court's signing of the summary judgment order, which divested the trial court and, in turn, this Court of any subject matter jurisdiction over this cause.[2] We disagree. Accordingly, we deny the motions for rehearing and issue this supplemental opinion addressing only the jurisdictional question.

PROCEDURAL BACKGROUND

The trial court heard appellees' motions for summary judgment on November 20, 1990. On that same date, the trial judge notified the parties by letter that "[t]he Motions for Summary Judgement [sic] of all Defendants are granted." The trial judge gave the parties ten days to file objections to the proposed judgment.

On November 30, 1990, appellants filed a motion for nonsuit without prejudice against MHMR and filed their objections to the proposed judgment. On December 11,

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[1] Appellees MHMR and its employees filed a motion for rehearing, and Drs. Kamphaus and Urschel filed a motion for rehearing. The motions each raise four points of error. This opinion addresses only the first point in each motion, the jurisdictional complaint. The remaining points are overruled without opinion.

[2] MHMR and its employees argue this Court erred in rendering a decision against MHMR, while Drs. Kamphaus and Urschel argue the nonsuit against MHMR bars all claims against them pursuant to section 101.106 of the Texas Civil Practice and Remedies Code.

1990, the trial court signed the order granting appellees' motions for summary judgment. Over the next three weeks, all appellees filed objections to appellants' motion for nonsuit. Appellees specifically urged the trial court to deny the motion because the motion was filed *after* the summary judgment hearing and *after* the trial court had notified the parties of its decision.

On January 9, 1991, the trial court vacated the December 11, 1990 order granting summary judgment. On January 24, the trial court overruled appellants' motion for nonsuit and signed a new order granting summary judgment for appellees. On motion for rehearing, appellees ask this Court to "affirm that neither the Trial Court nor this Court had jurisdiction from which [appellants] could appeal the summary judgment."

Appellees argue that because appellants filed their motion for nonsuit on November 30, and the dispositive order was not signed until two months later, MHMR was nonsuited prior to rendition of judgment. Thus, appellees contend the trial court lacked jurisdiction over the cause of action, and in turn, this Court lacks jurisdiction.

JURISDICTION

We note at this point that appellees' position on appeal is contrary to its position in the trial court. Nevertheless, the question of jurisdiction is fundamental in nature and thus may be raised at any time. *See Johnson v. Pettigrew*, 786 S.W.2d 45, 46 (Tex.App. – Dallas 1990, no writ); *Blair v. Blair*, 408 S.W.2d 257, 258 (Tex.Civ.App. – Dallas 1966, no writ). If the trial court lacks subject matter jurisdiction, the appellate court can take no action other

than to reverse the judgment of the court below and dismiss the cause. *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex.1985) (per curiam). Accordingly, we will address appellees' jurisdictional complaint.

1. Applicable Law

Rule 162 of the Texas Rules of Civil Procedure provides in part:

> At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order.

TEX. R. CIV. P. 162.

Thus, a plaintiff has an absolute, unqualified right to take a nonsuit *upon timely motion* as long as the defendant has not made a claim for affirmative relief. *McQuillen v. Hughes*, 626 S.W.2d 495, 496 (Tex.1981) (per curiam); *Progressive Ins. Cos. v. Hartman*, 788 S.W.2d 424, 426 (Tex.App. – Dallas 1990, orig. proceeding). The granting of a nonsuit is merely a ministerial act. *Shadowbrook Apartments v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex.1990) (per curiam); *Hartman*, 788 S.W.2d at 426. A trial court may not deny a party's right to take a nonsuit. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840-41 (Tex.1990). A trial court's jurisdiction over a cause ends when a notice of nonsuit is given for the only pending claim for affirmative relief. In effect, in such a situation, the filing of a nonsuit divests a

trial court of its subject matter jurisdiction. *See Ex parte Norton*, 118 Tex. 581, 17 S.W.2d 1041, 1043 (1929). *See also Williams v. National Mortgage Co.*, 903 S.W.2d 398, 402 (Tex.App. – Dallas 1995, writ denied); *Strawder v. Thomas*, 846 S.W.2d 51, 59 (Tex.App. – Corpus Christi 1992, no writ); *Ex parte Helle*, 477 S.W.2d 379, 385 (Tex.Civ.App. – Corpus Christi 1972, orig. proceeding).

However, once a judge announces a decision that adjudicates a claim, that claim is no longer subject to the plaintiff's right to nonsuit. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex.1995) (per curiam). Thus, the filing of a nonsuit in such a circumstance does not operate to divest a trial court of its subject matter jurisdiction.

2. Application of Law to Facts

In this case, the trial court sent a letter to the parties after the hearing on the motions for summary judgment. The letter stated that the "Motions for Summary Judgement [sic] of all Defendants are granted." Thus, the letter constituted rendition of judgment. *See Kostura v. Kostura*, 469 S.W.2d 196 (Tex.Civ.App. – Dallas 1971, writ ref'd n.r.e). Ten days later, appellants moved to nonsuit MHMR. Because the trial court had announced its decision adjudicating the claims prior to the filing of the motion for nonsuit, appellants were not entitled to nonsuit MHMR at the time the motion was filed. Thus, when the trial court reduced its decision to a signed, written order on December 11, 1990, it had jurisdiction over the parties just as it had jurisdiction when it rendered judgment by letter. We believe this conclusion is in accordance with *Alvarado*.

In *Alvarado*, the trial court granted partial summary judgment in favor of the defendant, Hyundai. The plaintiffs filed a motion to nonsuit and then filed a separate petition in Duval County bringing the same claims against Hyundai, including those on which Hyundai had obtained partial summary judgment. The trial court signed an order of nonsuit and also signed an order dismissing with prejudice those claims adjudicated by the summary judgment. The San Antonio Court of Appeals reversed, holding that a summary judgment does not withstand the plaintiff's right of nonsuit.

The supreme court reversed, reasoning that such a holding would allow a plaintiff to avoid summary judgment "merely by requesting a nonsuit after the case was adjudicated by the summary judgment." *Alvarado*, 892 S.W.2d at 885. The court held that a nonsuit sought after a judicial pronouncement results in a dismissal with prejudice as to the issues pronounced in favor of the defendant. *Alvarado*, 892 S.W.2d at 885. We believe the intent of this holding is to prevent a plaintiff from bringing the same claims disposed of by summary judgment in a separate lawsuit in another court. We do not construe it as a bar to appellate review of the trial court's summary judgment ruling. In fact, the Court remanded the cause to the court of appeals to consider the plaintiff's claim that the trial court erred in its summary judgment ruling. *Alvarado*, 892 S.W.2d at 855.

The next question in this case is what effect, if any, did the trial court's subsequent vacation of the order granting summary judgment have on the November 30 motion for nonsuit. Did the trial court's action in vacating the summary judgment order operate to convert an

untimely motion for nonsuit into a *timely* motion for nonsuit? We conclude it did not.

At the time the trial court reduced the judgment to a signed, written order granting the motion for summary judgment on December 11, it also had before it the untimely motion for nonsuit. Either motion would have disposed of appellants' claims against MHMR; MHMR's motion for summary judgment sought a meritorious disposition in MHMR's favor, while the untimely motion for nonsuit sought to dismiss the claims against MHMR without prejudice to refiling. The relief sought in each of the motions was mutually exclusive. The trial court signed the order granting summary judgment in favor of MHMR and the other defendants.[3] By doing so, we conclude the trial court, by necessary implication, denied the motion to nonsuit MHMR. *Cf. Vance v. Wilson*, 382 S.W.2d 107, 108 (Tex.1964) ("The general rule in Texas is that all issues presented by the pleadings are disposed of by the judgment unless the contrary appears from the face thereof."). The fact that the trial court expressly denied the motion in a subsequent order was not necessary in light of the prior order. Consequently, when the trial court later vacated the order granting summary judgment, there was no motion for nonsuit, timely or untimely, pending. Thus, contrary to appellees' assertion, MHMR was not nonsuited, and the trial court had subject

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[3] The motion also contained a "Mother Hubbard" clause, which provided: "IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT all other relief not specifically granted herein be and the same is hereby denied."

matter jurisdiction at the time it signed the second order granting summary judgment.

Furthermore, should we construe appellees' contention as an attack on the trial court's ruling, we conclude appellees are estopped from complaining of that ruling. A litigant cannot ask for something of a court and then complain that the court committed error in giving it to him. The rule, grounded in even justice and dictated by common sense, is that he is estopped. *Northeast Tex. Motor Lines v. Hodges*, 138 Tex. 280, 158 S.W.2d 487, 488 (1942); *Dolenz v. American Gen. Fire & Casualty Co.*, 798 S.W.2d 862, 863 (Tex.App. – Dallas 1990, writ denied).

Appellees opposed appellants' motion for nonsuit and specifically requested the trial court deny the motion. Appellees argued below that the motion was untimely under rule 162 of the Texas Rules of Civil Procedure because the trial court had rendered summary judgment in its favor prior to the motion being filed. The trial court did, in fact, deny the motion; thus, appellees received the exact ruling they requested. It is only *after* this Court issued its original opinion in this case reversing the summary judgment that appellees complained about the trial court's ruling. A party may not argue a theory on appeal that is different from that presented to the court below. *Austin Transp. Study Policy Advisory Comm. v. Sierra Club*, 843 S.W.2d 683, 689 (Tex.App. – Austin 1992, writ denied). Accordingly, we conclude that appellees cannot now come before this Court and take a position contrary to that taken in the trial court. Likewise, we reject any argument that appellants have waived their right of review of the summary judgment by seeking a nonsuit after the trial court announced its decision. *See Alvarado*,

892 S.W.2d at 855 (ordering remand to court of appeals for review of summary judgment ruling after holding motion for nonsuit ineffective).

We conclude the trial court had subject matter jurisdiction when it rendered summary judgment in fāvor of appellees and that this Court therefore has jurisdiction over this cause. Further, we conclude appellees are estopped from complaining about a trial court ruling they specifically sought. Accordingly, we deny the motions for rehearing.

/s/ Linda Thomas
LINDA THOMAS
CHIEF JUSTICE

Do Not Publish
TEX. R. APP. P. 90
910284FH.U05

No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	IN THE DISTRICT COURT
Plaintiffs,	
vs.	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. DORA POGUE, R.N. ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA AND PATRICIA PRINCE,	191ST JUDICIAL DISTRICT
Defendants,	DALLAS COUNTY, TEXAS

ORDER GRANTING SUMMARY JUDGMENTS

On the 20th day of November, 1990 came on to be heard the Summary Judgment Motions as file [sic] by John Kamphaus, M.D., Harold Urschel, M.D., Dallas County Mental Health and Mental Retardation Center and the Employees, Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Willams [sic], Domingo Davila and Patty Prince and came the Defendants by and through their attorney and came the Plaintiffs by and through their attorney and

the Court after considering the Pleadings and affidavits on file herein and hearing the Summary Judgment Evidence and argument of counsel was of the opinion that the following Judgment be entered:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Summary Judgment Motions as file [sic] by John Kamphaus, M.D., Harold Urschel, M.D., Dallas County Mental Health and Mental Retardation Center and the Employees, Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Willams [sic], Domingo Davila and Patty Prince be and the same are hereby granted and the Plaintiff's, Albert Bossley, individually, Elaine Bossley, individually, and as Representative of the Estate of Roger Arthur Bossley, Deceased take nothing by their lawsuit against John Kamphaus, M.D., Harold Urschel, M.D., Dallas County Mental Health and Mental Retardation Center and the Employees, Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Willams, Domingo Davila and Patty Prince.

IT IF FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants be and they are hereby awarded judgment against Albert Bossley, individually, Elaine Bossley, individually, and as Representative of the Estate of Roger Arthur Bossley, Deceased, for Cost of Court incurred by the Defendants for all of which let execution issue if not timely paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT all other relief not specifically granted herein be and the same is hereby denied.

Signed this 24th day of January, 1991.

/s/ David K. Brooks
JUDGE

ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al
vs.
Dallas County Mental Health and
Mental Retardation Center, et al
ORDER GRANTING SUMMARY JUDGMENTS
Signed and Entered: January 24, 1991
Recorded in Vol. J157, Page 119
IN THE MINUTES OF THE 191ST JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS.

No. 97-0028

IN THE SUPREME COURT OF TEXAS

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,
PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OR ROGER ARTHUR BOSSLEY, DECEASED,
RESPONDENTS

RESPONDENTS' MOTION FOR REHEARING

(Filed May 1, 1998)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Albert Bossley, individually, Elaine Bossley, individually, and as representatives of the estate of Roger Arthur Bossley, deceased, Respondents/Plaintiffs, file this motion for rehearing.

POINTS RELIED ON FOR REHEARING

1. This Court erred in rendering judgment against Albert Bossley in favor of MHMR and all individual defendants based on Section 101.106 of the Texas Civil Practice & Remedies Code because Albert Bossley timely non-suited his cause of action against MHMR and this Court lacks jurisdiction to render such a judgment.

2. This Court erred in not considering summary judgment evidence that raises a genuine issue of material fact on causation regardless of whether the legal standard

applied is proximate causation or direct and immediate causation.

3. This Court erred by requiring that the use or condition of tangible property be a direct and immediate cause rather than a proximate cause of Roger Bossley's death.

4. This Court erred by holding that a material issue of fact does not exist on the issue of proximate causation.

5. This Court erred by holding that all individual defendants were protected by section 101.106 of the Texas Civil Practice and Remedies Code.

6. This Court has violated Respondents' right to a trial by jury under the seventh amendment to the United States Constitution and Article I, section 15 of the Texas Constitution, and has violated Respondents' rights to due process of law under the fourteenth amendment to the United States Constitution and Article I, section 13 of the Texas Constitution by deciding material and contested issues of fact and interpreting statutes against their plain meaning.

* * *

Form 633-Physician's Certificate of Medical Examination for Mental Illness.

No. 88-2086

THE STATE OF TEXAS][
FOR THE BEST INTEREST][
AND PROTECTION OF][

R.B.

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION FOR MENTAL ILLNESS

I, the undersigned, a person licensed to practice medicine in the State of Texas, or person employed by an agency of the United States having a license to practice medicine in any state of the United States, do hereby certify to wit:

1. That my name and address is John Kamphaus, M.D., Hillside Center, Dallas TX

2. That on the 11th day of August, 1988, at the following location: Hillside Center, I evaluated and examined Roger Bossley, hereafter called "Patient."

3. The Patient, whose address is 521 Kingston, Grand Prairie, TX has been under my care for the following, if any, period of time: 18 days.

4. A brief diagnosis of the physical and mental condition of the Patient on said date is: Major depression.

5. An accurate description of the mental health treatment, if any, given by me or administered under my

direction is as follows: medication (impramine) and group/individual therapy.

6. That I am of the opinion that the Patient is mentally ill, and that as a result of that illness the Patient is likely to cause serious harm to self or others, or both self and others, or will, if not treated, continue to suffer severe and abnormal mental, emotional, or physical distress and will continue to experience deterioration of his ability to function independently and is unable to make a rational and informed decision as to whether or not to submit to treatment; and the detailed basis for this opinion is as follows: The patient remains depressed and periodically suicidal.

7. (NOTE: COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF A MOTION FOR AN OPC.)

That I am further of the opinion that the Patient presents a substantial risk of serious harm to self of [sic] others if not immediately restrained, the detailed basis for this opinion being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization.

8. (NOTE; COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF COURT-ORDERED EXTENDED MENTAL HEALTH SERVICES OR A RENEWAL OF SAME.)

That I am additionally of the opinion that the Patient's condition, as set out in item 6 above, is expected to continue for more than 90 days, the detailed basis for

this opinion being: The patient has remained suicidal, despite lengthy hospitalization here.

Signed and Dated this the 11th day of August, 1988.

/s/ John Kemphaus, M.D.
Examining Physician

Sworn to and subscribed before me, this the 11th day of August 1988.

/s/ Diane Harris
Notary Public, Dallas County, Texas

Texas Citizen Action

THE TEXAS SUPREME COURT IN 1996-97:
Insurers, Physicians Win Big
Before a Defendant-Oriented Court

. . . . Seven cases decided by the court involved physicians, hospitals or pharmaceutical companies as defendants. The defendants won all seven.

Governmental entities don't fare much worse, winning 6 of 7. . . .

Court Watch

A Program of Texas Citizen Action

THE TEXAS SUPREME COURT IN 1997-98:
A Kinder, Gentler Court May Be In the Works,
But It's Late Arriving

. . . . The big winners this past year include that [sic] insurance companies (10 wins - 3 losses - 1 split), Doctors and hospitals (8 - 0 - 3), governments (6 - 3 - 0), manufactures [sic] of allegedly defective products (8 - 3 - 0) and apartment owners/landlords (3 - 0 - 0) who have benefitted from court's conservative slant in the past. A series of employment and whistleblower cases added employers (8 - 0 - 0) to the list of big winners. . . .

Exhibit "B"

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE DISTRICT
VS.	(	COURT
	(	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(	DALLAS COUNTY, TEXAS
	(	
	(	191ST JUDICIAL DISTRICT

****

VIDEOTAPED DEPOSITION
OF
DOMINGO DAVILA

****

ANSWERS AND ORAL DEPOSITION OF DOMINGO DAVILA, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 11th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 39] A. I don't remember. It was far. It was pretty far. I don't know how far he was.

Q. Okay. Were you able to talk to Roger?

A. No, no. He was too far away.

Q. Okay. Did you run after him?

A. I ran, trying to catch up with him.

Q. Is that when Roger crossed the highway?

A. Yes.

Q. Did you attempt to stop the traffic at all?

A. Yes, I did. Yes, I did.

Q. How did you do that?

A. When he crossed to the other side, I kind of waved at the cars to slow down and a lot of them did.

Q. And why were you doing that?

A. So that they'll slow down and won't hit Roger.

Q. At the time that Roger crossed the highway, was he attempting to get hit by a vehicle?

A. Yes.

Q. Why did you come to that conclusion?

A. Because he ran right in front of an 18-wheeler and stopped dead center.

Q. Okay. I'm talking about when he first crossed the highway to the other side, was he attempting to be hit by a vehicle?

A. Yes, I believe so.

* * *

[p. 64] Q. Okay. I believe that you testified earlier that the first time you saw Roger was, he was on the Fort Worth side?

A. That's correct.

Q. The side headed toward Fort Worth?

A. That's correct.

Q. And you said that he was hitchhiking?

A. Yes, he was.

Q. Was he walking towards Fort Worth?

A. Yes, he was.

Q. When – do you recall what happened when you first spotted Roger? Or let me reask that.

Do you recall what Roger did when he first saw you or anyone in the van?

A. Yes. When he saw Danny and myself get off the van, Roger started running towards Dallas on the same side he was walking on. And Danny, he ran a few feet, and then he started running across the highway.

Q. Okay. And that's what you've depicted in the diagram?

A. Right.

Q. Okay. And I believe that in response to one of Mr. Oake's questions, you also testified that when Roger jumped in front of the truck that hit him, you thought that he was intentionally jumping in front of that truck; [p. 65] is that right?

A. Oh, I don't remember what I said there.

Q. Well, is that your opinion or –

A. Yes.

Q. Okay. Did he appear to want to jump or try to jump in front of a truck prior to that time?

A. Yes, he did.

Q. Okay. When was it that he first attempted to jump in front of a vehicle?

A. The first time he crossed over to the Dallas side.

Q. Okay. Was it – did he try and jump in front of a vehicle in the lane of traffic that was going to Fort Worth, or was it on the other side in the lane of traffic that was going to Dallas?

A. The first time was when he was going toward, when he crossed to the side towards the lane that was going towards Dallas, then he ran across, and he didn't even look at the traffic.

Q. And that was the first attempt he made?

A. Yes.

Q. When you first saw him headed to Fort Worth, did it appear to you, at that time while he was hitch-hiking, that he was, that he, did he attempt in any way to jump in front of any vehicle at that time?

[p. 66] A. No.

Q. Did he do anything that led you to believe that he might be attempting to kill himself?

A. No.

Q. Okay. Going back to when the police car stopped and all, do you know whether Roger reacted in any way to the police car?

A. I don't remember.

MR. PENNINGTON: I don't have any further questions at this time.

MR. OAKE: I've got one or two more.

RECROSS-EXAMINATION

BY MR. OAKE:

Q. Did you tell the police officer anything when you first got in the car?

A. I don't remember what I – yes, I did, but I don't remember what I said.

Q. When you initially saw Roger, you claim attempting to hitchhike, how long did you observe that?

A. Oh, it was just a split second, because we were moving too fast, I think.

Q. Okay.

MR. OAKE: I'll pass the witness.

MR. PENNINGTON: No further questions.

MR. BARNES: No, I don't have any questions.

* * *

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE DISTRICT
VS.	(	COURT
	(	
DALLAS COUNTY	(	DALLAS COUNTY,
MENTAL HEALTH	(	TEXAS
AND MENTAL	(	
RETARDATION, et al	(	191ST JUDICIAL
	(	DISTRICT

****

VIDEOTAPED DEPOSITION
OF
LAURA MOORE-

****

ANSWERS AND ORAL DEPOSITION OF LAURA MOORE, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 12th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 42] A. No.

Q. Before that point, had you seen Roger try to get run over by any vehicles?

A. I didn't see it. I just saw the cars swerving on the eastbound when he was crossing back and forth.

Q. Okay. At that point, did you consider that Roger's life was in danger because of the traffic?

A. Yes.

Q. And what he was doing?

A. Yes.

Q. Was anyone attempting to stop traffic at that time?

A. No.

Q. From the time that you first passed Roger and stopped the van until the time that you got out of the van and were calling to Roger, approximately how much time elapsed?

A. Two or three minutes.

Q. During that two or three minute period of time, was anybody attempting to stop the traffic?

A. No. Traffic was slowing down with all the commotion on the road. Traffic was slowing down. At least I noticed on the eastbound, where he had ran twice.

Q. All right. Okay. After you were calling to Roger and trying to talk to him, what did you see happen?

[p. 43] A. He looked at me and looked at the police car, looked at an oncoming truck and jumped in front of it.

Q. Where was the police car located?

A. Coming up the shoulder of the road, backing up, from what I remember now as we're going through this, on the westbound side, toward me.

Q. Okay.

A. But he was still a good fourth mile away from me. It was still pretty far away from me.

Q. All right. Did Roger – or do you have an opinion as to whether Roger intentionally jumped in front of the truck?

A. Yes.

Q. What is that opinion?

A. I feel that he intentionally jumped in front of the truck.

Q. Was there anything that you saw that the truck driver could have done to avoid Roger?

A. No.

Q. Was that the first attempt that you had seen Roger make to jump in front of a vehicle?

A. Visually, yes.

Q. Were you aware of any other attempt, any other way?

A. Just with the traffic on the eastbound side when [p. 44] he ran across twice.

Q. And then after Roger was hit by the truck, what did you do?

A. I ran across the highway trying to find out where he was.

Q. And did you see him?

A. Yes, I did.

Q. Did you hear Roger make any sounds?

A. No, I didn't.

Q. Did you see him move at all?

A. No.

Q. Okay. What did you do after you – I take it that you located Roger?

A. What happened is after it happened, Alice Bradley Harmon was running toward me. She went with me across the road.

MR. BARNES: You want to take a little break?

THE WITNESS: Yes, I really would like to.

Q. (By Mr. Oake) What happened next after you located Roger?

A. I located Roger, the staff and I went up to him to see if he was breathing, to just kind of assess, and I didn't see that he was at the time. I turned around, and the policeman was already coming down the hill.

* * *

Exhibit "A"

Procedure In Trial Court Below

(1)	November 20, 1990	Date of Summary Judgment Hearing
(2)	November 20, 1990	Filing Date of Letter from Judge David K. Brooks
(3)	November 30, 1990	Plaintiff's Motion to file Interrogatory Answers as Summary Judgment Proof after the Summary Judgment hearing and before Judgment.
(4)	November 30, 1990	Albert Bossley's Motion for Non-Suit without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation.
(5)	November 30, 1990	Plaintiff's Motion for Order Directing Parties to File Original Depositions With the Court prior to entry of Judgment.
(6)	December 11, 1990	Order Granting Summary Judgments
(7)	December 31, 1990	Plaintiff's First Motion for New Trial
(8)	January 9, 1991	Court on its own Motion was of the Opinion that the Order Granting Summary Judgments as signed on the 11th day of December, 1990 should be vacated; "came on to be heard" Plaintiffs' Motion for

		Leave to File Fourth Amended Original Petition, Motion for Leave to File Interrogatory Answers as Summary Judgment Proof, Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation and Plaintiff's Motion for Order Directing Parties to File Original Depositions with the Court.
(9)	January 23, 1991	Order Vacating Summary Judgments (based on Court's own motion dated January 9, 1991)
(10)	January 24, 1991	Order overruling Plaintiff Albert Bossley's Motion for Non-Suit; Order Granting Plaintiffs' Motion for Leave to File Fourth Amended Original Petition; Order Granting Motion for Leave to File Interrogatory Answers as Summary Judgment Proof; and Order Granting Plaintiffs' Motion for Order Directing Parties to File Original Depositions with the Court.
(11)	January 24, 1991	Order Granting Summary Judgments

NO. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	)	IN THE DISTRICT COURT
Plaintiffs,	)	
vs.	)	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D., HAROLD URSCHEL, M.D., DORA POGUE, R.N., ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA and PATRICIA PRINCE,	)	DALLAS COUNTY, TEXAS
Defendants.	)	191ST JUDICIAL DISTRICT

ALBERT BOSSLEY'S MOTION FOR NON-SUIT WITHOUT PREJUDICE AGAINST DEFENDANT DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION

(Filed Nov. 30, 1990)

ALBERT BOSSLEY, individually, one of the Plaintiffs in the above-entitled and numbered cause, states that he desires to take a non-suit of his cause of action, without prejudice, against only Defendant Dallas County Mental Health and Mental Retardation, with costs of court taxed pro rata against the party by whom incurred.

WHEREFORE, Plaintiff Albert Bossley prays that this Motion in all things be granted and that his suit against Defendant Dallas County Mental Health and Mental Retardation be dismissed without prejudice, with costs being taxed pro rata against the party by whom incurred.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
ROBERT G. OAKE, JR.
Bar Card No. 15154300

2435 N. Central Expy.,
Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600
ATTORNEY FOR PLAINTIFF

No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	IN THE DISTRICT COURT
Plaintiffs,	
vs.	191ST JUDICIAL DISTRICT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. DORA POGUE, R.N. ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA AND PATRICIA PRINCE,	DALLAS COUNTY, TEXAS
Defendants,	

ORDER VACATING SUMMARY JUDGMENTS

ON the 9th day of January, 1991, the Court on its own Motion was of the opinion that the ORDER GRANTING SUMMARY JUDGMENTS as signed on the 11th day of December, 1990 should be vacated and enters the following Order;

IT IS THEREFORE ORDERED that the ORDER GRANTING SUMMARY JUDGMENTS as signed by this Court on December 11, 1990 be and is hereby Vacated.

Signed this 23rd day of January, 1991.

/s/ David K. Brooks
JUDGE

ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al

vs.

Dallas County Mental Health and
Mental Retardation Center, et al
ORDER VACATING SUMMARY JUDGMENTS
Signed and Entered: January 23, 1991
Recorded in Vol. J156, Page 395
IN THE MINUTES OF THE 191ST JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS.

No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	*	IN THE DISTRICT COURT
Plaintiffs,	*	DALLAS COUNTY, TEXAS
v.	*	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. and DORA POGUE, R.N., ET AL,	*	191ST JUDICIAL DISTRICT
Defendants,	*	

ORDER

On the 9th day of January, 1991, came on to be heard Plaintiff's Motion for Leave to File Fourth Amended Original Petition, Motion for Leave to File Interrogatory Answers as Summary Judgment Proof, Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation and Plaintiffs' Motion for Order Directing Parties to File Original Depositions with the Court. After reviewing the pleadings and hearing the arguments from counsel for all parties, the Court is of the opinion that the following Order should be rendered;

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation is hereby OVERRULED;

Further, it is ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion for Leave to File Fourth Amended Original Petition, Motion for Leave to File Interrogatory Answers as Summary Judgment Proof, and Plaintiffs' Motion for Order Directing Parties to File Original Depositions with the Court are hereby GRANTED.

SIGNED this 24th day of January, 1991.

/s/ David K. Brooks
PRESIDING JUDGE

ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al
vs.
Dallas County Mental Health and
Mental Retardation, et al
ORDER
Signed and Entered: January 24, 1991
Recorded in Vol. J157, Page 117
IN THE MINUTES OF THE 191ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS.